United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

74-2116

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

EDWARD L. KIRKLAND and NATHANIEL HAYES, each individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; RUSSELL OSWALD, individually and in his capacity as Commissioner of the New York State Department of Correctional Services; THE NEW YORK STATE CIVIL SERVICE COMMISSION; ERSA POSTON, individually and in her capacity as President of the New York State Civil Service Commission and Civil Service Commissioner; MICHAEL N. SCELSI and CHARLES F. STOCKMEISTER, each individually and in his capacity as Civil Service Commissioner,

Defendants-Appellants,

-and-

ALBERT M. RIBEIRO and HENRY L. COONS,

Intervenors-Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

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FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Plaintiffs-Appellees Edward L. Kirkland, et al. (hereinafter, "plaintiffs"), hereby petition the Court for rehearing and reconsideration of one aspect of its decision entered August 6, 1975 which is of far-reaching significance: its reversal of that provision of the District Court's decree which ordered the appointment of Correction Sergeants in the ratio of one Black or Hispanic for each three whites until minority representation in that rank equals minority representation

in the underlying rank of Correction Officer. Plaintiffs request that, upon rehearing, the Court reverse its judgment as to this ruling. Plaintiffs further respectfully suggest that inasmuch as the panel's decision is in irreconcilable conflict with other decisions of this Court and involves important questions of public policy and judicial administration, this issue be reheard en banc.

Statement of the Case

In the Correction Officer series of the New York State Department of Correctional Services, the entry level position is Correction Officer. Promotions are made to successive supervisory positions of Sergeant, Lieutenant, Captain, Assistant Deputy Superintendent, Deputy Superintendent and Superintendent on the basis of a series of written examinations (A.1327-29).[1/] As of May 1, 1973, of 122 permanent Correction Sergeants, not one was Black or Hispanic (A.1448). Since 1961, there have been only two Blacks and no Hispanics permanently appointed to the rank of Sergeant or above in the entire New York State prison system (A.286, 395, 473-74, 533, 1447). There is no evidence in the record that any minorities held supervisory positions prior to 1961.

The complaint in this action, filed April 10, 1973 challenged the legality, under 42 U.S.C. §§1981 and 1983, of Civil Service examination 34-944 for promotion to the position of Correction Sergeant (Male), administered October 14, 1972, on the ground that it had a disproportionately adverse impact upon Black and Hispanic candidates and could not be shown to be job-related (A.7-24).

1/ This form of citation is to pages of the Joint Appendix.

Plaintiffs filed an amended complaint June 22, 1973 alleging that Sergeant examinations administered prior to 1972 also had a discriminatory impact on Blacks and Hispanics and could not be shown to be job-related (A.28-31).

Decision of District Court

The District Court found that examination 34-944 had a disproportionate impact upon Blacks and Hispanics and that defendants had not met their burden of establishing its job-relatedness. As to past examinations, the District Court found that "while there is evidence in the record of the discriminatory impact of the earlier tests, there is no evidence as to their job-relatedness" (A.181). It enjoined the use of eligibility lists promulgated on the basis of performance on examination 34-944 and ordered the preparation of a new selection procedure.

The District Court also ordered that any permanent appointments to the position of Correction Sergeant made either prior to the development of a new selection procedure or pursuant to the new selection procedure be in a ratio of one Black or Hispanic for each three whites "until the combined percentage of Black and Hispanic persons in the ranks of Correction Sergeants (Male) is equal to the combined percentage of Black and Hispanic persons in the ranks of Correction Officers (Male)" (A.244).

The Panel's Opinion

The panel affirmed the District Court's findings that examination 34-944 had a discriminatory impact and was not job related and

upheld the provisions of the decree enjoining defendants from making appointments based upon the results of that examination and directing the development of a new selection procedure. The panel also affirmed that portion of the decree relating to appointments made during the interim period prior to the development of a new selection procedure. It reversed, however, the District Court's order with respect to appointments made after the development of a new selection procedure.

The panel's reversal is based upon the ground that appointments of persons to civil service jobs in a sequence other than their order on a civil service eligibility list because of their race is "Constitutionally forbidden reverse discrimination" (slip op. at 5412). This holding interposes the New York State Civil Service Law as an insurmountable barrier between the victims of racial discrimination and the Court's duty to grant affirmative relief to eliminate, so far as possible, the effects of past discrimination, Louisiana v. United States, 380 U.S. 145, 154 (1965); cf. Albemarle Paper Co. v. Moody, 43 U.S.L.W. 4880, 4884 (1975). It is in irreconcilable conflict with the decisions of this Court in United States v. Wood, Wire & Metal Lathers, Local 46, 471 F.2d 408, cert. denied, 412 U.S. 939 (1973); Vulcan Society of the New York Fire Department, Inc., v. Civil Service Commission, 490 F.2d 387 (1973); Bridgeport Guardians Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (1973); Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622 (1974); and Patterson v. Newspaper and Mail Deliverers' Union, 514 F.2d 767 (1975).

State constitutional and statutory provisions regulating civil service appointment cannot limit the federal court's power and duty to render affirmative relief, in light of the Supremacy Clause of Article 6 of the United States Constitution. Carter v. Gallagher, 452 F.2d 315, 328 (8th Cir. 1971 and rehearing en banc,1972).

The panel supports its holding with assertions which reflect legal standards that uniformly have been rejected by this Court and others. Chief among these are 1) that plaintiffs did not prove that past examinations were discriminatory because they were unable to present complete statistical pass-fail data (slip op. at 5409-10) and because they did not prove that past examinations were not job-related (id. at 5410) and 2) that plaintiffs did not prove egregious, intentional racial discrimination (id. at 5409,5410).

Standards Applied by this Court in Approving Affirmative Relief

This Court has repeatedly affirmed relief similar to the promotional preferences mandated by the District Court. In the private employment context, it has held that "while quotas to attain racial balance are forbidden, quotas to correct past discrimination are not," Lathers, supra, 471 F.2d at 413 and that "[t]he effects of . . . past violation of the minority's rights cannot be eliminated merely by prohibiting future discrimination, since this would be illusory and inadequate as a remedy," Rios, supra, 501 F.2d at 631. In the civil service context, it has also sanctioned "quotas aimed at curing past discrimination." Bridgeport, supra, 482 F.2d at 1340.

Quotas have been approved in the face of express findings that

the discrimination was not "egregious" or "intentional." See Vulcan, supra, 490 F.2d at 390; Bridgeport, supra, 482 F.2d at 1336; Patterson v. N.M.D.U.,384 F.Supp. 585, 589 (S.D.N.Y.,1974), aff'd 514 F.2d 767, (1975). Compare with panel opinion at 5409. The single element that makes the affirmative provisions both lawful and necessary is proof of prior discrimination and its continuing effects. Louisiana v. United States, supra.

Plaintiffs respectfully submit that application of the legal standards established by this Court to the facts of this case fully justifies the affirmative relief granted by Judge Lasker.

Past Discrimination

There is uncontroverted evidence that there have been only two Blacks and no Hispanics permanently appointed to the rank of Sergeant or above. There is substantial unrebutted evidence that this startling under-representation has been brought about by the screening out effect of the non-job-related civil service examinations.

Defendants,who were the only possible source of such information, were unable to provide complete racial/ethnic pass-fail data for Sergeant examinations conducted prior to 1972 (A.1303). However, they were able to provide information with respect to those persons who took the 1970 Sergeant examination and were still employed on January 1, 1973. Of the 997 whites who took the 1970 examination and were still employed on January 1,1973, at least 94 or 9.4% passed; of the 46 Blacks and Hispanics who took the examination and were still employed on January 1, 1973, none received a passing

score (A.1436-43).[2/] With respect to pre-1970 Sergeant examinations, plaintiff Kirkland testified that at Ossining Correctional Facility alone 25 Blacks took the 1968 Sergeant exam and 10 to 15 Blacks took the 1965 Sergeant exam. Named plaintiffs and five other Blacks testified that they took the examination as many as four times and never scored high enough to be appointed (A.282, 349-50, 388, 436-37, 467, 518, 543). This evidence, taken with undisputed testimony that there were only two minority supervisors appointed since 1961, and expert testimony that Blacks and Hispanics tend to achieve lower scores than whites on the type of examinations in issue (A.1176-78, 1229) is sufficient to shift to defendants the burden of justifying their use. As Judge Friendly observed in Vulcan, in holding that Judge Weinfeld's finding of the racially disproportionate impact of the fireman's examination was not clearly erroneous,

> It may well be that the cited figures and other more peripheral data relied on by the district judge did not prove a racially disproportionate impact with complete mathematical certainty. But there is no requirement that they should ... We must not forget the limited office of the finding that Black and Hispanic candidates did significantly worse in the examination than others. That does not at all decide the case; it simply places on the defendants a burden of justification which they should not be unwilling to assume.

490 F.2d at 393. Accord: Boston Chapter, N.A.A.C.P., Inc. v. Beecher, 504 F.2d 1017 (1st Cir. 1974).

> When widespread minority underemployment is shown to exist in a given occupation, primary selection devices should not be immunized from study by placing

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2/ The passing score was 70% of 90 (the number of items on the exam) or 63.

> an unrealistically high threshold burden upon those with least access to relevant data.

Id. at 1020-21. See also Rogers v. International Paper Co., 510 F2d 1340, 1349(8th Cir. 1975).

The record is silent as to the job-relatedness of the pre-1972 exams except for substantial evidence that they were cut from the same cloth as examination 34-944. Sergeant examinations have for many years been prepared by the same process by which examination 34-944 was developed (A.624), a process which the panel agreed did not meet legally required standards (slip op. at 5405). The fact that a) the scope of every examination since 1964 was virtually identical (A. 1469), b) the class specifications for Correction Sergeant were unchanged since 1962 (A.1474-84), and c) prior examinations were consulted in preparing examination 34-944 (A.889) led the trial court to conclude that pre-1972 Sergeant examinations were similar to examination 34-944 (A.180-82). The panel's observation that since the duties of a Correction Sergeant have changed over the years "so that no retroactive inference concerning job-relatedness could be made as a result of examination 34-944 which was evaluated in relation to the job as it then existed" (slip op. at 5401) implies that the burden was on plaintiffs to establish that the earlier examinations were not job-related. This is contrary to the holdings of the Supreme Court in Griggs v. Duke Power Co., 401 U.S. 424 (1971), this Court in Chance v. Board of Examiners, 458 F.2d 1167 (1972) and their progeny.

The panel did not rule that the findings by the District Court that past examinations were discriminatory and had not been shown to be job-related (A.181) were clearly erroneous, nor, on this record, could it have done so.

Appropriateness of the Relief Granted

The Court has recognized as "the basic tenet" in passing upon relief granted by a trial Court in a case of this sort that "the district court, sitting as a court of equity, has wide power and discretion to fashion its decree not only to prohibit present discrimination but to eradicate the effects of past discriminatory practices," Bridgeport, supra, 482 F.2d at 1340, citing Louisiana v. United States, 380 U.S. 145, 154 (1965) and Lathers, supra, 471 F.2d at 413. In Vulcan, this Court, quoting International Salt Co. v. United States, 332 U.S at 392, 400 (1947), stated, "The framing of decrees should take place in the District rather than in the Appellate Courts." 490 F.2d at 399. Most recently, in Rios v. Enterprise Association Steamfitters Local 638, 501 F.2d 622,631 (1974) ("Rios"), this Court has reiterated its determination to leave the nature and extent of relief from past discrimination to the sound discretion of the trial judge.

In Bridgeport, supra, this Court approved a hiring ratio, aimed at a goal of 15% Black and Puerto Rican representation, that required 50% of the first ten vacancies, 75% of the next twenty, and 50% of the next sixty to be awarded to minority group members. 354 F.Supp.

778, 798-99.[3/]

There is no indication in the opinions of either the District Court or this Court that such appointments were to be limited to the period during which a new selection procedure was being developed. The ratios were to be maintained until the goal was reached.

In Bridgeport the Court specifically enumerated the factors that persuaded it to approve Judge Newman's hiring quota,

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3/ These numbers represent a hiring quota. This Court reversed the district judge's quota on promotions. This reversal was not based on any doubt that such a remedy, where appropriately supported, would be lawful and necessary. Rather, as this Court reaffirmed in Patterson, supra, 514 F.2d at 774, "The Bridgeport Guardians decision was based upon the failure to establish any discrimination within the promotional system, the proof being limited to discrimination at the point of entry into the police force, i.e., in qualifying for the rank of patrolman. See 482 F.2d at 1338-41." In Patterson, this Court approved, over the objections of a white incumbent, a settlement agreement which provided that minority persons not previously employed in the industry would achieve a higher priority status for daily hiring and promotion than whites who had worked under the collective gargaining agreement for years.

> . . . To the extent that the settlement may cause a temporary decline in Group III white workers' rate of promotion and daily work priority, it merely compensates for past discrimination by allowing a reasonable number of minority persons to be promoted to the "rightful place" on the seniority ladder, which they would have occupied but for industry-wide racial discrimination.

514 F.2d at 775. Similarly, in Rios, supra, this Court affirmed, in relevant part, a decree providing for quota admissions to A Branch of the union, despite the fact that this would give "new" minorities a higher priority status than senior whites in B Branch who did A Branch work when there was a shortage of Group A Branch members, 360 F.Supp. 979,986 (S.D.N.Y.1973)(Finding of Fact No.18).

factors equally applicable to the present record. First, the Court noted that

> the defendants were employing an archaic test which was not validated and which . . . was not job related. Attacks by Blacks and others upon examinations emphasizing verbal skills and not testing the professional skills of the vocation applied for, have been under increasing attack, and the failure here of the defendants to recognize the increasing evidence that tests of this type have an innate cultural bias, cannot be overlooked.

482 F.2d at 1340. Examination 34-944 and other recent Sergeant examinations were also "archaic." They differed scarcely at all from past examinations, in spite of sweeping recent changes in what is expected of Sergeants (A.769, 1460). Not only should these defendants have been aware that they were using a hopelessly outmoded and discriminatory promotional procedure, they actually were.[4/] A.1458-60.

Second, the Bridgeport Court relied on the defendants' failure to undertake any affirmative steps to recruit minority personnel, 482 F.2d at 1340. Here, the record is barren of any affirmative efforts of any nature to overcome discrimination or the gross underrepresentation of minorities in the system.

Third, and more important, the Court noted that the District Court had provided that the quota would be filled by "qualified Blacks

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4/ Cf. Attica, The Official Report of the New York State Special Commission on Attica (1972), in a discussion of "the department as it exists, what the problems are," at p.26:

> For promotion, evaluations of an officer's performance on the job and his ability to relate to inmates were not considered. Written examinations were the key, and after three years' service any Correction Officer could take an exam for Sergeant.

and Puerto Ricans and not merely token personnel selected because of race and not qualification." 482 F.2d at 1341. As in Bridgeport, the lower court here has assured that persons who ultimately benefit from affirmative relief provisions are qualified by ordering the development of validated selection procedures.[5/]

Finally, the Court in Bridgeport noted with emphasis that,

> This is not a private employer and not simply an exercise in providing minorities with equal opportunity in employment. This is a police department and the visibility of the Black patrolman in the community is a decided advantage for all segments of the public at a time when racial divisiveness is plaguing law enforcement.

482 F.2d at 1341. The same comment is equally forceful in the correctional field, a crucial aspect of the law enforcement system. The point is made more telling by the fact that in most of New York State's correctional facilities the inmate population ranges upward from 50% to over 80% Black and Hispanic (A.1279). Recent events have spotlighted the dangers of a largely minority-group, urban inmate population controlled by almost exclusively white, rural

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5/ The panel opinion states that the District Court's order provides for appointment of minorities (after the development of a new selection procedure) "without regard to whether the benefitted Black or Hispanic received a passing grade" (slip op. at 5414). The decretal provision in question reads as follows:

> "Upon completion of the development of the revised selection procedures and subject to the Court's approval thereof, the defendants . . . are enjoined from failing to appoint as permanent Correction Sergeants (Male) pursuant to the new procedures at least one Black or Hispanic employee for each three white employees so appointed, until the combined percentage of Blacks and Hispanic persons in the ranks of Correction Sergeant (Male) is equal to the combined percentage of Black and Hispanic persons in the ranks of Correction Officers (Male)." (A.244) (emphasis added).

(cont'd)

corrections personnel. See generally, Attica: The Official Report of The New York State Special Commission on Attica (Bantam, 1972).

An additional factor which has been cited in approving relief of this nature is that the quota is of short duration. Patterson, supra, 514 F.2d at 776 (concurring opinion of Feinberg, C.J.); Vulcan, supra, 490 F.2d at 399. In the instant case, the goal could be met immediately. While there is no record evidence as to current minority representation in the rank of Correction Officer, the Brief for Defendants-Appellants states that as of May 27, 1974, 13.1% of Correction Officers were Black or Hispanic (Br. at 131). At the time defendants' brief was filed, November 6, 1974, there were 245 sergeant "slots," 128 of which were being filled by provisional appointees (id.at 122-23 and n.*). Defendants are under an obligation, under the provisions of the decree affirmed by the panel and pursuant to State law, to develop a new selection procedure as quickly as possible in order to replace provisional appointees with permanent appointees.

If when the 128 provisional appointees are replaced by permanent appointees, appointments are made in the ratio of one minority for every three non-minorities, that is, 32 minorities and 96 non-minorities, the goal will have been met.[6/]

5/ (cont'd).
Plaintiffs read this as requiring the appointment only of persons who have been found to be qualified under the new selection procedures. Any ambiguity, could, of course, be resolved on remand.

6/ 13% of 245 (the total number of Sergeants) equals 32. While the decree does not fix the time at which the percentage of minority representation among correction officers is to be ascertained for

(cont'd)

Conclusion

Rehearings en banc are normally reserved for cases of exceptional importance and to resolve conflicts of decision within the circuit.[7/] The issue of affirmative relief is manifestly one of great importance, both to groups which have been the victims of racial discrimination and to the public at large. The panel decision is in conflict with other decisions of the circuit; unsettled law discourages settlement and encourages litigation and appeals. This decree involving affirmative relief which could be implemented immediately (p.13, supra), and reflecting the care and wisdom of a highly respected judge "should be almost the last to attract appellate

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6/ (cont'd)

purposes of determining whether the goal for minority Sergeants has been met, plaintiffs have not interpreted the decree to require a "permanent" quota (compare slip op. at 5414), but merely to require that at one point in time the minority representation among Sergeants reach the level of minority representation among Officers. If the Court feels that the order is unsatisfactory in that it does not designate either a fixed percentage or a fixed time for ascertaining the percentage, this could be rectified on remand. Cf. Rios v. Enterprise Association Steamfitters, Local 638, 501 F.2d 622, 633 (2nd Cir. 1974).

7/ Rule 35, Federal Rules of Appellate Procedure; Moody v. Albermarle Paper Co. 417 U.S. 622, 626 (1974);. United States v. American Foreign Steamship Corporation, 363 U.S. 685, 689 (1960); Western P.R. Corp. v. Western P.R. Co., 345 U.S. 247, 270-71(1953) (concurring opinion of Frankfurter, J.)

intervention." Vulcan, supra, 490 F.2d at 399 (Friendly, J.) This, therefore, is one of the rare cases in which judicial efficiency would be advanced by en banc resolution of the conflict which the panel's opinion has generated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 20th day of August, 1974, I served two copies of the Appellees' Petition for Rehearing and Suggestion for Rehearing En Banc upon the following counsel by United States Mail, postage pre-paid:

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